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Nos. 79-1959, 79-2060, 80-103, and 80-105

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

MEAT PRICE INVESTIGATORS ASSOCIATION, *et al.*,
Petitioners,
v.
SAFEWAY STORES, INC., *et al.*,
Respondents.

A. L. BLACK, *et al.*,
Petitioners,
v.
ALBERTSON'S, INC., *et al.*,
Respondents.

RICHARD S. LOWE, *et al.*,
Cross-Petitioners,
v.
SAFEWAY STORES, INC., *et al.*,
Cross-Respondents.

R. DIRK AGEE, *et al.*,
Petitioners,
v.
SAFEWAY STORES, INC., *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the above captioned petitions for writs of certiorari to review the decision of the United States Court of Appeals in *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979).

STATEMENT OF THE CASE

Several hundred cattlemen (including the petitioners herein) have sued 25 food retailers, a wholesale grocer, a retailers' trade association, and a beef industry publication (respondents herein). The cattlemen allege that the named defendants and others unnamed had conspired to pay meat packers low prices for beef and that the packers had passed on the impact to the cattlemen by paying low prices for live cattle.[1] The cattlemen do not claim that they sold any of their cattle directly to the retailers.

On June 9, 1977, this Court decided *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), which holds that only those persons who deal directly with alleged price fixing conspirators may maintain private actions for treble damages.[2] In July 1977 respondents moved for judgment

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[1] In 1976, the Judicial Panel on Multidistrict Litigation assigned the cattlemen's cases to the District Court for the Northern District of Texas. *In re Beef Industry Antitrust Litigation*, 419 F. Supp. 720 (J.P.M.D.L. 1976). Certain of the same cattlemen plaintiffs shortly thereafter filed new suits, including an industry-wide class action, against a number of the largest meat packers, alleging that the cause of depressed cattle prices was a conspiracy among the middleman meat packers. These cases were also transferred to the Northern District of Texas. *See In re Beef Industry Antitrust Litigation*, 607 F.2d 167, 170 (5th Cir. 1979), *petition for cert. filed sub nom. Iowa Beef Processors, Inc.* v. *Meat Price Investigators Ass'n*, 48 U.S.L.W. 3538 (U.S. Feb. 6, 1980) (No. 79-1214).

[2] The holding made treatment of claims and defenses consistent by completing the analysis in this Court's prior decision in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968). There the Court held that, in a suit by direct purchasers, an anti-

on the pleadings. The cattlemen were thereafter allowed to amend their complaints to take account of *Illinois Brick* and respondents' motion. Some of the petitioners filed amendments in an attempt to avoid *Illinois Brick*; others elected to stand on the complaints originally filed. In October 1977 the district court announced its intention to dismiss the complaints. Some plaintiffs then advised the court that they might seek further leave to amend, but none did so by December 9, 1977, when the court finally dismissed the complaints with prejudice.

The court of appeals reversed. It held that, although *Illinois Brick* is applicable, the indirect suits could nonetheless be maintained upon allegations that supply was inelastic and that middlemen used formulas in computing price, with the result that the cattlemen bore the full impact of any conspiracy. Respondents have sought certiorari to review this determination by the court of appeals. *Safeway Stores, Inc.* v. *Meat Price Investigators Association*, No. 79-1920.

Respondents' petition asserts that *Illinois Brick* prohibited antitrust actions by indirect purchasers or sellers in order to eliminate from litigation the need to engage in the complex process of apportioning effects of price or output decisions throughout a distribution chain; that the court below would create a new exception for remote claimants that would invite widespread litigation of just those effects; and that in this respect the decision is contrary to *Illinois Brick*, is squarely in conflict with decisions in other circuits, and will have serious adverse consequences for the conduct of antitrust cases because of the substantial abandonment of the *Illinois Brick* rule.

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trust defendant may not assert as a defense that the plaintiffs had passed on illegal overcharges to indirect purchasers who were therefore the parties in fact injured by the overcharge. *Id.* at 491-94. The cases and possible exceptions are discussed in respondents' petition for certiorari. *Safeway Stores, Inc.* v. *Meat Price Investigators Association*, No. 79-1920, at 5.

The cattlemen have filed the instant cross petitions for certiorari (Nos. 79-1959, 79-2060, 80-103, and 80-105). The cattlemen's petitions present three different issues:

(1) Does the rule of *Illinois Brick* apply only when a customer tries to sue a remote supplier, and not when a supplier tries to sue a remote customer.

(2) Does the rule of *Illinois Brick* permit indirect suits upon allegations that direct purchasers or sellers do not have strong incentives to sue.

(3) Did the lower courts misconstrue the cattlemen's complaints or improperly refuse additional amendments.

ARGUMENT

The additional issues raised by the cattlemen-petitioners are insubstantial and do not warrant review by this Court. The cross petitions argue principally that *Illinois Brick* and *Hanover Shoe* were wrongly decided. But petitioners offer no special reason why this Court should visit those decisions anew.

I

In *Illinois Brick* and *Hanover Shoe* this Court addressed questions of major public import for the enforcement of the antitrust laws through private damage actions. Efforts to apportion recovery for injury absorbed at various tiers in a chain of distribution had produced difficulties for courts and litigants, had burdened the judicial system, and had impaired the efficacy of private antitrust enforcement itself. This Court determined that private actions should not be burdened with these apportionment questions. The rule of *Illinois Brick* was designed specifically to accomplish that result.

The cattlemen-petitioners nonetheless contend that, while the rule may be appropriate in cases where customers sue, it should not apply to bar claims by suppliers.

But uncertainties and difficulties in analyzing price and output decisions are equally present whether an indirect plaintiff is a customer or a supplier. In either case the apportionment rests on the same theory and calls for the same type of evidence; and in either case it is necessary to prove how prices, sales, costs, and benefits would have varied at each level in the distribution chain if the challenged conduct had not occurred.[3] The court of appeals therefore held that

> "there is nothing special about monopsony or oligopsony price-fixing cases that justifies treating them differently from monopoly price-fixing cases for passing-on purposes. *Illinois Brick* therefore speaks to the instant cases." *Beef Industry*, 600 F.2d at 1159.

The court of appeals was clearly correct. This issue was resolved in *Illinois Brick*. There has since been no conflict in the circuits[4] and the cattlemen's petitions raise nothing new.

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[3] *See Illinois Brick*, 431 U.S. at 731-33. In *Illinois Brick* the defendant was alleged to benefit from high prices charged to direct purchasers; here the defendants are alleged to benefit from low prices paid to direct suppliers. As the court below found, both types of circumstances are "attended by restrictions in industry output and the consequent reallocation of resources to less valuable uses." *Beef Industry*, 600 F.2d at 1158.

[4] Petitioners in No. 79-2060 are simply wrong in suggesting that the Fifth Circuit's decision on this point creates a conflict in the circuits. None of their cited cases involved, as here, the application of *Illinois Brick* to suits by indirect sellers. Thus, *Mid-West Paper Products Co.* v. *Continental Group, Inc.*, 596 F.2d 573 (3d Cir. 1979), and *Dart Drug Corp.* v. *Corning Glass Works*, 480 F. Supp. 1091 (D. Md. 1979), involved suits brought by indirect purchasers; *In re Japanese Electronic Products Antitrust Litigation*, 1980-2 Trade Reg. Rep. (CCH) ¶ 63,418 (E.D. Pa. 1980), and *In re Uranium Antitrust Litigation*, 473 F. Supp. 393 (N.D. Ill. 1979), involved suits brought by a direct competitor; and *Fontana Avia-*

Petitioners also argue that their supplier claims are not pass-on claims because they must sell into a market whose total price level is depressed and, as a result, some cattlemen whose beef does not reach any of the respondent retailers may nevertheless be injured by the general reduction in prices caused by the alleged violations.[5] The purported difference is irrelevant. Petitioners' complaints plainly allege, as they must, a pass-on theory requiring apportionment of effects.[6] And proof of injury must still

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tion, Inc. v. *Cessna Aircraft Co.*, 617 F.2d 478 (7th Cir. 1980), involved a suit brought by a firm that was both a direct competitor of and purchaser from defendant. The only one of those decisions that directly addressed the issue even in dictum concluded that, for purposes of the *Illinois Brick* rule, suits by indirect sellers are "the simple mirror image" of suits by indirect purchasers. *In re Japanese Electronic Products Antitrust Litigation*, 1980-2 Trade Reg. Rep. (CCH) ¶ 63,418 at 76,155.

[5] In support of the contention that theirs are not pass-on claims, petitioners cite a footnote from the court of appeals' decision in which the court indicated that plaintiffs' theory of damages is not a pass-on theory "in all respects." *Beef Industry*, 600 F.2d at 1166 n.24. The cited footnote discusses the different problem of following a specific product through a distribution chain. The court's opinion recognizes throughout that petitioners were relying on a pass-on theory.

[6] For example, petitioner MPIA—whose complaint was amended to meet *Illinois Brick* and was then adopted by other plaintiffs as "typical of the allegations of all complaints at issue here" (Memorandum in Opposition to Defendants' Motion for Judgment on the Pleadings, MDL Record at 1382 n.2, *Beef Industry*, 600 F.2d 1148 (5th Cir. 1979))—alleged that the respondent food retailers "[f]ix, stabilize and maintain at uniform non-competitive and artificially low levels, the price paid to slaughterhouses and beef packers for fresh and processed beef, *which artificially low prices are directly passed through to cattlemen. . . .*" Amended Complaint, MPIA Record at 861 (emphasis added), *Beef Industry*, 600 F.2d 1148 (5th Cir. 1979). Similarly, plaintiffs in *Black* explicitly alleged that "[t]he prices paid by retailers . . . for dressed meat at wholesale *ultimately filter down in the form of lower prices*, which are

be made for each claimant by apportioning the effects of price changes through multiple distribution levels.[7]

II

The cattlemen-petitioners also urge that the rule of *Illinois Brick* and *Hanover Shoe* should be changed to permit indirect plaintiffs to bring suit whenever there may not be strong incentives for the direct plaintiff to sue. This question has also specifically been resolved by this Court.

In *Hanover Shoe* this Court held that the payment of an unlawful price establishes a prima facie case of injury and damage within the meaning of Section 4 of the Clayton Act and that it is irrelevant that the impact may thereafter have been passed on to others.[8] In *Illinois Brick* the Court completed the equation by refusing to permit allocation of damages "among all 'those within the defendant's chain of distribution'" and holding that only those who deal directly with alleged price fixers may sue.[9] The Court expressly rejected the argument that the result should be different because the middleman in some circumstances may not have incentive to sue. It

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passed on through the distribution chain until they reach the livestock producers and the feeders of livestock. . . ." Amended Complaint, Black Record at 46 (emphasis added), *Beef Industry*, 600 F.2d 1148 (5th Cir. 1979).

[7] The complexities of proof caused by such apportionment are particularly apparent in a case like that of the *Lowe* petitioners who, as cattle feeders, are themselves middlemen who buy cattle and later resell them to meat packers for eventual resale to retailers. *See* Petition No. 80-103 at 3.

[8] 392 U.S. at 488-94.

[9] 431 U.S. at 746.

acknowledged the possibility that some persons "who may have been actually injured" may not recover and some suits might not be brought at all.[10] The Court chose nonetheless to give full sanction to the direct suits and to bar the indirect claims in their entirety in order to make antitrust enforcement more effective by eliminating complexities of proof.

The Court said:

> "[O]n balance, and until there are clear directions from Congress to the contrary, we conclude that the legislative purpose in creating a group of 'private attorneys general' to enforce the antitrust laws under § 4, *Hawaii* v. *Standard Oil Co. of Cal.*, 405 U.S., at 262, is better served by holding direct purchasers to be injured to the full extent of the overcharge paid by them than by attempting to apportion the overcharge among all that may have absorbed a part of it." *Illinois Brick*, 431 U.S. at 746.

Congress has not given any indication to the contrary. Nothing else has transpired since the decision of this Court to suggest that the Court was wrong. The cross petitions simply seek to have this Court revisit—without cause—the basic issue that it carefully and appropriately resolved just three years ago.

III

The court of appeals examined and properly rejected the cattlemen-petitioners' assertions (1) that the amended complaints alleged a conspiracy between respondents and the middleman packers, and (2) that if they did not, the district court should have granted petitioners leave to make further amendments toward that end. The court of appeals found that the interpretations sought by the cattlemen were inconsistent with the al-

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[10] *Id.*

legations of the complaints.[11] It also found that there had been ample opportunity to amend and that the district court had not abused its discretion in prohibiting additional amendments after judgment.[12]

Petitioners do not challenge the standards applied to determine when pleadings are adequate and when amendments should be permitted.[13] The only questions petitioners raise relate to specific interpretations of complaint

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[11] *Beef Industry*, 600 F.2d at 1161. For example, the *Lowe* petitioners—who now imply that their complaint alleged a vertical conspiracy between retailers and unnamed meat packers (Petition No. 80-103 at 4, 14-17)—actually alleged that "Defendants . . . and *other unnamed co-conspirator grocery chains*, have, by the unlawful exercise of their market power, precluded meat packers . . . from effectively bargaining over prices . . . at which fresh, frozen and processed meat is sold . . . to grocery chains. . . ." Complaint, Lowe Record at 13-14 (emphasis added), *Beef Industry*, 600 F.2d 1148 (5th Cir. 1979). Indeed, petitioners took a position directly contrary to that now asserted when they opposed transfer to Texas of suits they had brought against meat packers alleging that the meat packers had conspired to underpay the cattlemen. The cattlemen there asserted that "none of the actions [against meat packers or retailers] alleges any conspiracy between the two groups of defendants . . . ." *In re Beef Industry Antitrust Litigation*, 432 F. Supp. 211, 212 (J.P.M.D.L. 1977).

[12] *Beef Industry*, 600 F.2d at 1161-62. The cattlemen had numerous opportunities to amend before judgment: after *Illinois Brick* was decided, after the motions to dismiss were filed, and after the court announced its intention to dismiss. Some petitioners did amend; others chose to stand on their complaints. It was only after final judgment that the court denied the further amendments that are the basis of petitioners' argument here.

[13] Petition No. 79-1959 at 17-18, 20, Petition No. 79-2060 at 15-16, Petition No. 80-103 at 14, and Petition No. 80-105 at 16-20, *citing McLain* v. *Real Estate Board of New Orleans, Inc.*, 100 S. Ct. 502, 511 (1980); *Cruz* v. *Beto*, 405 U.S. 319, 322 (1972); *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172, 174-75 (1965); *Foman* v. *Davis*, 371 U.S. 178, 182 (1962); *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957).

language and discretionary action by the district court. Those are not matters warranting this Court's review.

CONCLUSION

The cattlemen's petitions should be denied. The petition submitted by respondents as petitioners in *Safeway Stores, Inc.* v. *Meat Price Investigators Association*, No. 79-1920, should be granted.

Respectfully submitted,

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